No. 34762-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Dunleavy,

Appellant.

Walla Walla County Superior Court Cause No. 16-1-00200-2

The Honorable Judge John W. Lohrmann

Appellant's Reply Brief

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

In its statement of the case, Respondent makes two questionable assertions. First, Respondent claims that "[i]nmates are notified of jail policies at booking." Brief of Respondent, p. 2. This is incorrect: a written copy of jail policies is "supposed to be available" at booking; however, reviewing the policies is "optional." RP 23, 45.

Second, contrary to the jury's verdict, Respondent claims that Mr. Dunleavy "brutally attacked" LaMunyon, and that Mr. Dunleavy was "complicit in the injury inflicted by Mr. Owen." Brief of Respondent, pp. 3, 7. In fact, the jury acquitted Mr. Dunleavy on the assault charge. CP 36.

ARGUMENT

I. THE TRIAL JUDGE IMPROPERLY COERCED THE JURY'S GUILTY VERDICTS.

After deliberations begin, a judge may not instruct jurors in a way that suggests the need for agreement. CR 6.15(f)(2); *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978). Doing so invades the right to a jury trial. *Id.*

Here, the judge improperly suggested a need for agreement by instructing jurors (during deliberations) to continue deliberating "in order

to reach a verdict." CP 5. This instruction applied the "subtle" pressure forbidden by *Boogaard*, 90 Wn.2d at 736.

The timing of this otherwise proper instruction violated Mr. Dunleavy's constitutional rights. *Id.;* U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. Because it was provided during deliberations, there is "a reasonably substantial possibility that the verdict was improperly influenced." *State v. Ford*, 171 Wn.2d 185, 188-189, 250 P.3d 97 (2011).

The error may be addressed for the first time on review. *Id.,* at 188; RAP 2.5(a)(3). To raise a manifest constitutional error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

A claim of "judicial coercion affecting a jury verdict" falls within RAP 2.5(a)(3). *Ford*, 171 Wn.2d at 188. Here, "given what the trial court knew at the time," the error could have been avoided entirely. *O'Hara*, 167 Wn.2d at 100. Respondent's arguments reflect the type of confusion described by the *Lamar* court. *Lamar,* 180 Wn.2d at 583 (explaining that

the showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right.")

Respondent also fails to address the *O'Hara* standard, which is the most recent articulation of the manifest constitutional error standard. Brief of Respondent, p. 8. Under *O'Hara,* the error qualifies for review because the trial court could have corrected (or avoided) it, given what the judge knew at the time. *O'Hara*, 167 Wn.2d at 100.

Likewise unpersuasive is Respondent's claim that jurors were "struggling with" the assault charge when they submitted their question to the court. Brief of Respondent, p. 10. The jury asked if the jail policies were "legally binding." CP 5. This question was relevant to only one element: the lawfulness of Mr. Dunleavy's entry into the neighboring cell. The potential deadlock involved the burglary charge, not the assault. CP 5.

The court's directive to deliberating jurors that they should continue their work "in order to reach a verdict" implied that minority jurors "should 'give in' for the sake of [reaching a verdict.]" *Boogaard*, 90 Wn.2d at 736. It applied a subtle pressure forbidden by the constitution. *Id.* Mr. Dunleavy's convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE STATE FAILED TO PROVE THAT MR. DUNLEAVY "UNLAWFULLY" ENTERED OR REMAINED IN A "BUILDING."

The burglary charge must be dismissed because the state failed to prove the elements required for conviction. *State v. Mau*, 178 Wn.2d 308, 312, 317, 308 P.3d 629 (2013). The evidence does not show that Mr. Dunleavy unlawfully entered or remained in a building.

A. Mr. Dunleavy did not enter or remain in a "building" separate from the jail where he was incarcerated.

The state failed to prove that Mr. Dunleavy entered or remained unlawfully in a building separate and apart from the jail itself. RCW 9A.52.030(1). The open jail cell he entered is akin to a room in a house. *See State v. Thomson*, 71 Wn. App. 634, 642, 861 P.2d 492 (1993).[1] Jail cells in a jail are not separate buildings because they are not "occupied or intended to be occupied by different *tenants* separately." *Id.*, at 644 (emphasis added).

The government is the legal tenant occupying the jail. Inmates are not "tenants," and have no legitimate expectation of privacy in their cells. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393 (1984); *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227,

[1] It is irrelevant that *Thomson* addressed a rape charge rather than a burglary. *See* Brief of Respondent, p. 16. The definition of building is the same.

3234, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556, 99 S. Ct. 1861, 1883, 60 L. Ed. 2d 447 (1979).

Because inmates lack privacy and are not the legal tenants of their cells, the cells cannot be considered "separate buildings" under RCW 9A.04.110(5). *See, e.g., State v. Deitchler*, 75 Wn. App. 134, 137, 876 P.2d 970 (1994).

Mr. Dunleavy was lawfully inside the jail; he did not enter or remain in a separate building. The state produced insufficient evidence of burglary, requiring reversal of the conviction. *Mau*, 178 Wn.2d at 312, 317.

B. Mr. Dunleavy did not "unlawfully" enter or remain in his neighbor's cell.

The state did not prove that Mr. Dunleavy "unlawfully" entered or remained in a building. RCW 9A.52.030(1). A person's entry or remaining is lawful if the person reasonably believes he is licensed to enter or remain. RCW 9A.52.010(2); *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005). A common law license may be implied from the circumstances. *State v. C.B.*, 195 Wn. App. 528, 538, 380 P.3d 626 (2016). Accordingly, an accused person's reasonable belief that he had an implied common-law license to enter or remain will defeat a burglary charge. RCW 9A.52.010(2); *J.P.*, 130 Wn. App. at 895.

The state did not prove unlawful entry or unlawful remaining. Mr. Dunleavy could have reasonably believed he had an implied license to access other cells, and the state did not prove otherwise. The "local custom" in the jail, along with the corrections department's "conduct [and] omission[s]," allowed him and his neighbors to reasonably believe they had an implied license to access cells assigned to other inmates. *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997).

The state did not rebut the evidence of this "local custom." *See* RP 13-14, 46, 66-67, 91, 99. The state's evidence was insufficient to prove burglary.[2] The conviction must be reversed and the charge dismissed. *Mau*, 178 Wn.2d at 312.

C. This court should not follow Division II's unpublished decision in *Kalac*.

The *Kalac*[3] decision does not support conviction here. There are three reasons this court should not follow *Kalac*.

First, several legally significant facts distinguish *Kalac* from Mr. Dunleavy's case. As outlined above and in the opening brief, Mr. Dunleavy and his fellow inmates could reasonably believe they had an

[2] The jury's question regarding the jail's policies shows that they struggled with the unlawfulness element. CP 5.

[3] *State v. Kalac*, 195 Wn. App. 1060 (2016), *review denied,* 187 Wn.2d 1011, 388 P.3d 486 (2017) (unpublished).

implied license to enter other cells. *See* Appellant's Opening Brief, pp. 12-14. The state did not prove otherwise. In *Kalac,* by contrast, the state conclusively proved that no such license could be implied. *Id.,* at *1-6. Furthermore, the defendant himself testified that he knew he couldn't enter another inmate's cell. *Id.*

Second, *Kalac* conflicts with *Thomson,* and its reasoning is inferior to the *Thomson* court's logic. When it considered the definition of the word "building," the *Kalac* court ignored the statute's ambiguity (recognized in *Thomson*), disregarded the statute's legislative history (outlined by the *Thomson* court), and overlooked the need to determine whether separate units are occupied by different "tenants." *Id.; cf. Thomson*, 71 Wn. App. at 643-646.

Third, the *Kalac* court failed to address the lack of privacy that inheres in a jail cell. *See Hudson*, 468 U.S. at 526. Unlike a house, apartment, or hotel room, the purpose of jail is to confine its occupants. *See Lanza v. State of N.Y.*, 370 U.S. 139, 143, 82 S. Ct. 1218, 8 L. Ed. 2d 384 (1962). Inmates are not tenants: they do not occupy their cells "by any kind of right or title." Black's Law Dictionary (10th ed. 2014).

The jail cells in this case do not qualify as separate buildings. Mr. Dunleavy did not "unlawfully" enter or remain in a building. This court should not follow *Kalac.*

III. THE TRIAL COURT ERRED BY FINDING THAT MR. DUNLEAVY HAD AT LEAST NINE PRIOR FELONY CONVICTIONS.

At sentencing, the state presented no evidence of prior felony convictions. RP 190-208. The court thus had before it no "information [that was]... admitted, acknowledged, or proved at trial or at the time of sentencing." RCW 9.94A.530. Mr. Dunleavy's failure to object to the prosecutor's assertions does not compensate for the lack of proof: "the defendant's mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgment." *State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

It is not a "waste of resources" to require the government to follow the law. Brief of Respondent, p. 20. If, as Respondent asserts, the state has proof of Mr. Dunleavy's prior convictions, it should have introduced them into evidence at his sentencing hearing. Alternatively, the state could have obtained a written stipulation or a clear acknowledgment on the record from the defense. If there is any "waste of resources," it stems from the government's failure to avail itself of any of these options.

Sentencing errors are not uncommon. *See, e.g., State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010); *In re Call*, 144 Wn.2d 315, 320, 28 P.3d 709 (2001). Only when the record is complete can errors be

uncovered. Mr. Dunleavy's sentence must be reversed, and the case remanded for a new sentencing hearing. *Hunley*, 175 Wn.2d at 912.

IV. MR. DUNLEAVY SHOULD NOT BE BURDENED WITH APPELLATE COSTS.

Given Mr. Dunleavy's indigency, appellate costs are not appropriate. RAP 14.2; *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015). The problems identified by the *Blazina* court have not vanished. *Id.,* at 835-837. This court should not rely on Respondent's unsupported assertions regarding "AOC software" and the Walla Walla clerk's "longstanding practice." Brief of Respondent, p. 22.

The trial court's "finding of indigency remains in effect." RAP 14.2. The state has not submitted any evidence to prove "by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2.

Legal financial obligations make it harder for indigent offenders to reenter society. *Id.,* at 835. This court should not impose the "nominal" costs requested by Respondent.[4] *Id.* Adding to Mr. Dunleavy's financial

[4] In addition, this court should reject the idea that $500-$1000 is a "nominal" cost to an indigent offender. *See* Brief of Respondent, p. 24.

burden would do nothing but create additional barriers to his efforts to rejoin society following release. *Id.*

CONCLUSION

The convictions must be reversed and the burglary dismissed with prejudice. In the alternative, the case must be remanded for a new trial. If the convictions are upheld, the sentence must be vacated and the trial court must hold a new sentencing hearing. No appellate costs should be ordered.

Respectfully submitted on June 19, 2017,

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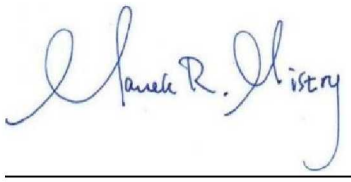

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 19, 2017.

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